Supreme Court, U.S.
FILED
951067 DEC 29 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES REGNANTE,

Petitioner,

vs.

FRANK A. DI DOMENICO, ROCCO L. MIRALDI, KENNETH L. MILLER, AND WILLIAM T. GRIGGS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Whether state officials can be sued for damages in their individual and personal capacities for civil rights violations under 42 U.S.C. § 1983, 1985, 1988, and under 28 U.S.C. § 1343.

2. Whether Federal claims can be removed to a state court for determination against a plaintiff's wishes.

3. Whether State of Indiana Career Bipartisan employees have a property right in employment and are protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Second Circuit:

1. James Regnante, Appellant/Petitioner;
2. Frank A. Di Domenico, Appellee/Respondent;
3. Rocco L. Miraldi, Appellee/Respondent;
4. Kenneth L. Miller, Appellee/Respondent;
5. William T. Griggs, Appellee/Respondent.

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OPINIONS BELOW

The opinion delivered by the Court of Appeals in this case was not published. A copy of the opinion is attached beginning at page 1 of the Appendix. The opinion of the District Court for the Eastern District of New York is at page 3 to 9 of Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Second Circuit were entered on August 1, 1995. App. at 1-2. Petitioner's petition for Rehearing was denied on October 11, 1995. App. at 10. This petition is filed within 90 days of the denial of rehearing. See Sup.Ct. R. 13.1, 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of constitutional and statutory provisions involved in this case are:

1. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

2. 28 U.S.C. § 1343 in part provides:

   (a) The districts courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

   (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 Title 42;

   (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

   (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, customs or usage, of any rights, privileges, or immunities secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

3. Fourteenth Amendment to the United States Constitution in part provides;

   "No state shall make or enforce any law which abridge the privileges or immunities

of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; nor denied to any person within its jurisdiction equal protection of the laws."

4. Career Bipartisan Act, Indiana Code 4-15-2.5-9; Employment status; appeal by employee.

> Any employee that is dismissed, demoted, suspended or laid off for cause may appeal such action by the procedure which is now or hereinafter provided by Indiana Code IC 1971, 4-15-2.

STATEMENT OF THE CASE

Your Petitioner, JAMES REGNANTE, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit that refused to recognize lawsuits against state officials in their individual and personal capacities under 42 U.S.C. § 1983, 1985 1988, and under 28 U.S.C. § 1343 (a)(1)(2)(3); and refused Petitioner the right to have his federal claims adjudicated in the federal courts under 28 U.S.C. § 1441(b); and denied a State of Indiana Career Bipartisan employee equal protection of the laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Second Circuit decision conflicts with this Court's decisions in *Hafer v. Melo, et al.*, 112 S. Ct. 358 (1991); *England et al. v. Louisiana State Board of Medical*

Examiners et al., 375 U.S. 411 (1963); and *Cleveland Board of Education v. Loundermill*, 105 S. Ct. 1487-1504 (1985). The Second Circuit decision conflicts with the Court of Appeals for the Third, Fifth, and Sixth Circuits. The ramifications are substantial. The Second Circuit decision gives refuge to state officials from damages for civil rights violations. The impact of this decision will be felt through-out the nation. Moreover, the Second Circuit's decision threatens to undermine federal jurisdiction over 42 U.S.C. § 1983 Actions and this Court's decisions in this area of law.

This Action commenced on February 24, 1993, in the United States District Court for the Eastern District of New York, under 42 U.S.C. § 1983, 1985, and 1988, and under 28 U.S.C. § 1343 suing the Respondents, who are public officials of the State of Indiana, for damages in their individual and personal capacities for violations of Petitioner federal protected rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and for Defamation pursuant to 42 U.S.C. § 1983.

The Respondents are: Frank A. Di Domenico, regional administrator, from New York State; Rocco L. Miraldi, Field supervisor, from New Jersey; Kenneth L. Miller, deputy commissioner, from Indiana; and William T. Griggs, audit administrator, from Indiana, (collectively, Respondents).

Petitioner was hired in New York State in 1977 by the Indiana Dept. of Revenue, an agency of the State of Indiana, under its Career Bipartisan Act, Indiana Code 4-15-2.5 *et seq.* to audit taxpayers in New York and the

surrounding areas. The State of Indiana Career Bipartisan Act, Indiana code 4-15-2.5 *et seq.* gave Indiana state employees statutory property rights in their employment with the State of Indiana.

During 1990, Respondents demanded assessments against New York State taxpayers contrary to the State of Indiana tax laws. Because of these illegal demands Petitioner filed internal complaints against his supervisors, Rocco Miraldi, and Frank Di Domenico with William Griggs, audit administrator, and Kenneth Miller, deputy commissioner. On April 20, 1990, Petitioner was illegally and suddenly dismissed from employment. Respondents refused to recognize Petitioner property rights in employment granted by the State of Indiana and they did not abide by the State of Indiana appeal section, Indiana code 4-15-2.5-9, (see page 3).

On February 11, 1991, Petitioner filed a lawsuit against the Indiana Department of Revenue in the State of Indiana and not against the Respondents. In the Indiana complaint, the Indiana Department of Revenue is being sued for violation of Petitioner rights under the Indiana Constitution, and various other Indiana statutes.

A. Court Proceedings

1. In the District Court for the Eastern District of New York

On August 29, 1994, the Federal District Court for the Eastern District of New York dismissed this case in its entirety based upon the abstention doctrine. App. at 3 to 9. The District Court refused to take jurisdiction of this

case and consider the lawsuit to that of suing the State of Indiana, thereby protecting the Respondents under the "abstention doctrine" from being sued for damages in their personal and individual capacities under 42 U.S.C. § 1983, 1985, 1988 and under 28 U.S.C. § 1343. App. at 5. A motion for reconsideration was denied by the District Court on September 22, 1994.

2. In the Court of Appeals for the Second Circuit

On August 1, 1995, the Court of Appeals for the Second Circuit affirmed the lower court decision without any comments on Petitioner's Brief, and ordered the Circuit opinion not to be published.[1] App. 1-2. Although the Second Circuit stated that its decision is not to be relied upon in unrelated cases in any court, the decision of the District Court may be relied upon and cited as affirmed by the Second Circuit by any state official seeking refuge from personal lawsuits under 42 U.S.C. § 1983. This decision affect thousands of Indiana state employees. The decision also affects section 1983 actions against state officials through-out this country. The Court of Appeals for the Second Circuit has opened up an avenue of escape

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[1] The signatures of the Honorable Judges Pierre Leval and Guido Caladresi was not affixed to this decision. App. 2. Judge Winter signed their names in violation of federal rules of appellate procedures, 27(c) which states: . . . except that a single judge may not dismiss or otherwise determine an appeal. . . . a single judge has determined this appeal and violated Petitioner's constitutional right under the due process clause of the fifth amendment to the United States Constitution. This decision should not be allowed to stand under this circumstance.

for state officials being sued for damages in their individual and personal capacities for civil rights violations. By order dated October 11, 1994, the court of appeals denied Petitioner petition for rehearing with suggestion for rehearing en banc. App. at 10.

* * *

In this Federal Lawsuit, Petitioner is suing the Respondents for damages in their "individual capacities" under 42 U.S.C. § 1983, 1985, 1988, and under 28 U.S.C. § 1343 for violations of Petitioner's federal protected rights under the Fourteenth Amendment to the United States Constitution, and for Defamation pursuant to 42 U.S.C. § 1983. None of the federal lawsuit charges are part of the Indiana lawsuit, and Respondents are not being sued in any other court in the United States. On April 22, 1993, the Indiana Marion Superior Court granted a "stay" on all State proceedings until the completion of this case.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons;

1) The Second Circuit decision undermines this Court decision in *Hafer v. Melo, et al.*, 112 S. Ct. 358 (1991), and 42 U.S.C. § 1983, 1985, 1988, and 28 U.S.C. § 1343. The Second Circuit refuses to recognize lawsuits against state officials in their individual and personal capacity for damages, stemming from civil rights violations.

2) The Second Circuit decision conflicts with the Third, Fifth, and Sixth Circuits and undermines this

Court decision in *England v. Louisiana State Board of Medical Examiners et al.*, 375 U.S. 411 (1963) and 28 U.S.C. § 1441(b).

3) The Second Circuit decision denies the State of Indiana Career Bipartisan employees equal protection of the law under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and conflicts with this Court's decision in *Cleveland Board of Education v. Loundermill*, 105 S. Ct. 1487-1504 (1985). This decision affects thousands of the State of Indiana Career Bipartisan employees.

The question raised in this case are perhaps among the most vital questions affecting civil rights, that is the right to sue Respondents, who are officials of the State of Indiana, for damages in their personal and individual capacities for civil rights violations. This right is secured by 28 U.S.C. § 1343, and 42 U.S.C. § 1983 of the Civil Rights Act of 1871 which reads in part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

The Court of Appeals for the Second Circuit has sanctioned the abridgment of this fundamental constitutional right in an opinion that conflicts with the Third, Fifth, and Sixth Circuits. App at 1-2. In this case, the

Second Circuit ignored this statute. Without discussion of the issues or authorities, the court of appeals shielded the Respondents, who are public officials of the State of Indiana, from personal lawsuits under a new doctrine called "abstention".

I

THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT DECISION AND THE THIRD CIRCUIT IN *HAFER V. MELO ET AL*, 112 S.CT. 358 (1991)

This Court has explicitly held public officials can be sued in their personal and individual capacities under 42 U.S.C. § 1983. *Hafer v. Melo, et al.*, 112 S.Ct. 358 (1991). The decision of the Court of Appeals for the Second Circuit conflicts with this decision and that of the Third Circuit which this Court affirmed.

In *Hafer v. Melo, et al.*, 112 S.Ct. 359 (1991), this Court held: (1) state officers may be personally liable for damages under section 1983 based upon action taken in their official capacities; (2) officers' liability is not limited to acts under color of state law that are outside their authority or not essential to operation of state government, but also extends to acts within their authority and necessary to performance of governmental functions.

The Second Circuit decision allows Respondents to escape from a section 1983 action in their personal capacities under the abstention doctrine. This Court refused to extend absolute immunity beyond a very limited class of officials; however, the Court of Appeals for the Second

Circuit not only extended immunity but created an avenue of escape for every public official in state and local government throughout the United States by annihilating 42 U.S.C. § 1983 and 28 U.S.C. § 1343 through the abstention doctrine. The Respondents are not being sued in any other court in the United States.

II

THE DECISIONS OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT DECISION AND THE THIRD, FIFTH, AND SIXTH CIRCUITS ON ABSTENTION

In *Deakins v. Monaghan,* 108 S. Ct. 523 (1988), this Court affirmed the Court of Appeals for the Third Circuit that had required a district court to stay rather than dismiss monetary claims that the state proceedings could not adjudicate. The Second Circuit decision conflict with the Third Circuit. Respondents are being sued for money damages in this case.

The Court of Appeals for the following Circuits ruled abstention cannot apply to claims for money damages; *Thomas v. Texas State Bd. of Medical Examiners,* 807 F.2d 453, 457 (5th Cir. 1987); *Carras v. Williams,* 807 F.2d 1286, 1291-92 (6th Cir. 1986). The Second Circuit decision in this case conflicts with the Fifth and Sixth Circuits.

* * *

Abstention is an extraordinary remedy and runs contrary to the fundamental policy that federal courts may not decline the resolution of controversies over which they have jurisdiction. Abstention denies any American the right to a Federal forum and use of abstention by the

court of appeals and the district court undermines federal jurisdiction and civil rights remedies under 42 U.S.C. § 1983, 1985, 1988.

This Court has repeatedly reiterated the familiar principle that a federal court has an unswerving duty to exercise jurisdiction over the cases brought before it. In *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court stated abstention was improper and the federal court must exercise its jurisdiction and protect "Mercury rights". The Second Circuit ignored the principles that this Court lay down in this case, and affirmed the District Court abstention doctrine.

The prime element of the abstention doctrine is that the parties and issues are the same; in this case, the parties and issues are not the same, and the abstention doctrine cannot apply. The Court of Appeals for the Second Circuit allowed the District Court for the Eastern District of New York to go beyond the allegations in Petitioner's complaint. The Federal Court for the Eastern District of New York changed the lawsuit to suing the State of Indiana under Indiana law instead of suing the Respondents in their individual and personal capacities under 42 U.S.C. § 1983, 1985, 1988, and under 28 U.S.C. 1343 (a)(1)(2)(3). App at 5. The Court of Appeals for the Second Circuit, and the District Court established a new precedent that may be relied upon by state officials seeking refuge from future 42 U.S.C. § 1983 actions, thereby nullifying any decisions this Court has made in this area of law. The decisions of the District Court and the Court of Appeals for the Second Circuit compromised the specific constitutional right of any litigant to present their case to a jury.

III

THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT DECISION ON ABSTENTION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In *England v. Louisiana State Board of Medical Examiners et al.*, 375 U.S. 412-413 (1963), this court stated: (1) Any party to litigation may reserve his right under the abstention doctrine to litigate federal questions in federal court, (28 U.S.C. § 1441(b)); (2) once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question; (3) if the litigant refused to have his federal claims decide by a state court, the District Court will have no alternative but to vacate its order of abstention.

This Court also stated in *England*: 375 U.S. at 414 (1963).

> "there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon federal courts, and with the principle that when a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

Petitioner demanded before the Second Circuit that his federal claims be adjudicated in the federal courts and that he has property rights in employment with the State of Indiana under the Career Bipartisan Act, Indiana code 4-15-2.5 *et seq.* and that he is protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Second Circuit dismissed Petitioner's federal claims under the abstention doctrine and paid no attention to this Court's decisions in *England v. Louisiana State Board of Medical Examiners* 375 U.S. 412 (1963), *Cleveland Board of Education v. Loundermill,* 105 S. Ct. 1487 (1985), and the State of Indiana Career Bipartisan Act, Indiana code 4-15-2.5 *et seq.*

In *Cleveland Board of Education v. Loundermill,* 105 S.Ct. 1487 (1985) this Court stated that public employees having property rights in continued employment cannot be deprived of that property right without due process. The Second Circuit refused to recognize Indiana Career Bipartisan employees' property rights in employment with the State of Indiana which is contrary to *Loundermill* and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment should be reversed.

Dated December 27, 1995

Respectfully submitted,

JAMES REGNANTE, Petitioner
66-92 Selfridge Street
Forest Hills, New York 11375
(718) 793-5149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse Foley Square, in the City of New York, on the 1st day of AUG, one thousand nine hundred and ninety five.

Present:

Honorable Ralph K. Winter,
Honorable Pierre N. Leval,
Honorable Guido Calabresi,
Circuit Judges.

JAMES REGNANTE,
Plaintiff-Appellant,

v.

FRANK A. DI DOMENICO,
ROCCO L. MIRALDI,
KENNETH L. MILLER, and
WILLIAM T. GRIGGS,
Defendants-Appellees.

ORDER
94-9031

(Filed
Aug. 1, 1995)

Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed.

James Regnante appeals from Judge Platt's decision to abstain from the exercise of federal jurisdiction and to dismiss Regnante's complaint under 42 U.S.C. § 1983. The decision of the district court is affirmed for substantially the reasons stated therein.

/s/ Ralph K. Winter
Hon. Ralph K. Winter, U.S.C.J

/s/ Pierre N. Leval (signature not affixed)
Hon. Pierre N. Leval, U.S.C.J.

/s/ Guido Calabresi (signature not affixed)
Hon. Guido Calabresi, U.S.C.J.

FROM CLERK OF COURT
8-4-95

NB: THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

UNITED STATES DISTRICT
COURT EASTERN DISTRICT
OF NEW YORK

----------X

JAMES REGNANTE,

Plaintiff,

-against-

FRANK A. DI DOMENICO, ROCCO L. MIRALDI, KENNETH MILLER, and WILLIAM T. GRIGGS,

Defendants.

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93-CV-816
(TCP)

MEMORANDUM
AND ORDER

PLATT, Chief Judge.

Defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking a dismissal of the complaint on the basis of abstention and qualified immunity. For the reasons stated herein, this Court abstains and the action is hereby dismissed.

BACKGROUND

There is no dispute between the parties as to the material facts of this case.[1] Plaintiff James Regnante was

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[1] Plaintiff's 3(g) Statement does not dispute the facts as alleged by defendants in their 3(g) Statement, although he does assert that there was a political motivation for his termination and the other events that are germane to his complaint. These assertions are conclusions and not facts which preclude consideration of summary judgment on the basis of abstention at this time.

employed by the State of Indiana Department of Revenue from 1977 until 1990, working in the Great Neck, New York office conducting tax audits of those in the East Coast region who potentially owed taxes to the State of Indiana. At the time of the events at issue, defendant Frank A. DiDomenico was the Regional Administrator for areas including New York State; defendant Rocco L. Miraldi was a field supervisor working within the State of New York; defendant Kenneth L. Miller was the Deputy Commissioner of Revenue, and defendant William T. Griggs was the Audit Administrator for the Department of Revenue.

On or about February 9, 1990, defendant DiDomenico sent Mr. Regnante a memorandum informing him that his work had been unsatisfactory for the previous six months. On April 20, 1990, defendants DiDomenico and Miraldi met with Mr. Regnante at the Revenue office in Great Neck and gave him a letter of resignation. Confronted with such, plaintiff resigned.

On April 26, 1990, Mr. Regnante met with defendants Miller, Griggs, and the Commissioner of Revenue, John Gildea to discuss his termination. Mr. Regnante objected to the allegations that his work was unsatisfactory, and requested that the Department of Revenue review the circumstances pursuant to Indiana statutes and rules. His termination was maintained.

Prior to his termination, Mr. Regnante had written to the Indiana State Employee's Appeals Commission (hereinafter "SEAC") to complain about circumstances involving his employment. In a response dated February 8, 1990, he was informed that Revenue employees do not

have appeal rights under IC 4-15-2-35 or the Official Merit Rules of the State Personnel Department. *See* Exhibits to Defendants' 3(g) Statement. This position was reiterated by the SEAC in three subsequent letters dated June 27, 1990, July 5, 1990 and July 18, 1990, sent to Mr. Regnante when he wrote to them insisting otherwise. *See* Exhibits to Defendants' 3(g) Statement. In the July 5, 1990 response, he was informed that the Department of Revenue had requested and was granted an exemption in 1973 from the Career Bi-Partisan Act, which includes certain appeals rights he demanded, and the minutes of that January 9, 1973 meeting were attached.

On February 11, 1991, Mr. Regnante filed a lawsuit in state court in Indiana naming the Indiana Department of Revenue, a Division of the State of Indiana as the defendant. The complaint alleges that he was denied various due process rights due him under Indiana law, amounting to a violation under 42 U.S.C. § 1983. This case has progressed to the point where the State has filed two motions for summary judgment, prompting Mr. Regnante's requests for leave to amend his complaint, which were granted. Plaintiff filed his Second Amended Complaint in the State Court action on March 15, 1993.

The month before, in February, 1993, Mr. Regnante filed a complaint in this Court alleging essentially the same claims advanced in his State complaint, yet the individual actors rather than the State are named as defendants.[2] On April 14, 1993, soon after defendants'

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[2] This action is being defended by the State of Indiana on behalf of the individual defendants.

answer in this action raised the issue of abstention, Mr. Regnante requested a stay of the State action, which was granted. Subsequently, his action was dismissed for failing to apprise the State Court of the progress of the federal action here, yet upon his request, the action was reinstated in August, 1993. Thus, at the present moment, Mr. Regnante has an action pending in both the Indiana State Court and this New York Federal Court seeking essentially identical relief. Defendants have moved for summary judgment in this action, seeking dismissal of the case on the basis of abstention and qualified immunity.

DISCUSSION

Defendants argue that this Court should exercise abstention and dismiss this case in favor of the action currently pending in the Indiana State Court. This Court agrees.

There are two "abstention" doctrines which apply to this case. The first involves the so-called *Pullman* doctrine, enunciated by the Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). This doctrine mandates that a federal court refrain from exercising jurisdiction in a case involving federal rights if the existence or nature of those rights are questions of state law. *Pullman* involved an order entered by the Texas Railroad Commission, purportedly authorized by Texas law. The plaintiffs brought an action in federal court alleging, *inter alia*, violations of the equal protection and due process clauses of the United States Constitution. The Supreme Court declined to adjudicate the matter,

stating that "[t]he last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas." *Pullman*, at 499-500, 61 S.Ct. at 645.

An analogous situation exists in the case at bar. Mr. Regnante claims that he is entitled to various procedural reviews of his termination, the deprivation of which amounts to a violation of his constitutional rights. Part of his argument is that any exemption from these procedural mandates granted to the Department of Revenue back in 1973 was improper since he alleges that the required "approval" by the Governor was not legitimate since the Governor's signature is a forgery. Plaintiff also claims that this exemption has expired. Clearly this issue of whether the exemption was proper, if it exists, or what entitlements may be due an employee of the State of Indiana is a question that should be resolved by the Indiana State Court before the federal implications of those rights, should they exist, is considered.[3]

The facts of this case also implicate another abstention doctrine, which permits the dismissal of a federal suit in deference to a pending concurrent state proceeding. The parameters of this doctrine were first enunciated by the Supreme Court in *Colorado River Water Conservation*

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[3] The Supreme Court in *Pullman* directed that the district court maintain jurisdiction of the case until the state court determined the state law questions. So too would the result be here, except that the alternative abstention doctrine, discussed below, favors dismissal of the case in its entirety.

District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976). Having determined that the case at hand did not fall into any of the traditional abstention doctrines, the Court stated that "circumstances [existed] permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding" although it was "exceptional." *Id.* at 818, 96 S.Ct. at 1246. The Second Circuit explored these circumstances in *Arkwright-Boston Manufacturers Mutual Insurance Co. v. the City of New York*, 762 F.2d 205 (2d Cir. 1985) in affirming the District Court's dismissal on the basis of abstention. It reiterated them as "(1) whether either court has assumed jurisdiction over property; (2) inconvenience of the federal forum; (3) avoidance of piecemeal litigation; and, (4) the order in which the courts obtained jurisdiction." *Arkwright*, at 210. It also recognized the Supreme Court's additional factors of "whether federal or state law provides the substantive rule to determine the merits . . . and the 'probable inadequacy of the state court proceeding to protect plaintiffs' rights,' " *id.*, as enunciated in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552 (1978) and *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 103 S.Ct. 927 (1983), respectively.

Following the lead of the Supreme Court, the Second Circuit endorsed a balancing test of those factors that applied and affirmed abstention. *Id.*, at 210-212. These factors dictate abstention in the present case as well. Here, the first factor does not apply, but the convenience of the Indiana State Court versus the New York federal court favors abstention. Here, too, there is a desire to avoid piecemeal litigation which may result if the two courts, asked to resolve the same questions, proceed concurrently. In addition, in this case, the State Court

obtained jurisdiction first, and in fact the case had progressed for two years and advanced through two summary judgment motions when this federal court complaint was filed. Finally, considering the final factors, it is Indiana State law which will dictate the substantive claims of this case, and plaintiff has not made any showing that his rights will not be protected in the Indiana State Court; in fact, a review of that Court's patience with plaintiff, granting him leave to file two amendments to his original complaint, and even restoring the case after plaintiff failed to follow the Court's order indicates that plaintiff's rights most definitely are safeguarded in the Indiana State Court. It is clear from an analysis of these factors that this Court should exercise abstention and dismiss this complaint in favor of the case now proceeding in the Indiana State Court.[4]

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment dismissing this case on the basis of abstention must be and hereby is granted.

SO ORDERED.

/s/ illegible
Chief Judge, U.S.D.C.

Dated: Uniondale, New York
August 24, 1994

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[4] Having resolved this dispositive issue, the Court deems it unnecessary to discuss the qualified immunity issues raised by defendants' motion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eleventh day of October one thousand nine hundred and ninety-five.

Regnante

Appellant,

v

DiDomenico

Appellee.

Dkt No: 94-9031

(Filed
Oct. 11, 1995)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant James Regnante.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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